Supreme Court, U.S.
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No. 93-1070

In The

Supreme Court of the United States

October Term, 1993

BOB SKIPPER, SHERIFF OF MULTNOMAH COUNTY,

Petitioner,

v.

KIM REUTER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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Respondent fails to meet its heavy burden to demonstrate that this case has become moot, *County of L.A. v. Davis*, 440 U.S. 625 (1979), or to show that the issues presented by the preliminary injunction in this case merged into the issues presented by the permanent injunction.[1] Moreover, Respondent fails to address the issue of damages stemming from the wrongfully issued preliminary injunction. Plainly, the issues presented by this appeal are alive, and not moot.

INTRODUCTION

1. The issues raised by the preliminary injunction do not merge into those raised by the permanent injunction.

The district court decided that the Norris-LaGuardia Act (the "Act") did not apply to the present case, and in so doing failed to follow the Act's strict requirements for issuance of an injunction. 29 U.S.C. § 107 requires posting of adequate security before issuing a preliminary injunction. It also requires that the bond cover all reasonable costs, including reasonable attorney fees and the expense of defense caused by the improvident or erroneous issuance of such an order. These costs and damages are separate from those incurred in defending Respondent's § 1983 action.

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[1] Respondent string-cites a series of inapposite cases to establish an irrelevant point, i.e., that in a non-labor context, a preliminary injunction often merges into a permanent injunction (Resp. Brief in Opp. p. 7-8). Only one case Respondent cites involves the Act: *Certified Grocers of Ill. v. Produce Etc. Un., Loc. 703*, 816 F.2d 329 (7th Cir. 1987), discussed *infra*.

If an injunction is improperly granted and the party against whom it was granted is entitled to recover damages resulting from the wrongful issuance, the expiration of the preliminary injunction does not render the litigation moot. *Inter. U., United Auto., Etc. v. LaSalle Mach. Tool*, 696 F.2d 452 (6th Cir. 1982).

In *Inter. U., United Auto., Etc. v. LaSalle Mach. Tool*, the employer intended to sell its machinery, subcontract its work and terminate employees in violation of an agreement not to subcontract. The district court issued a *Boys Market* injunction[2] pending arbitration, and ordered the union to post a bond. The employer appealed, but the arbitrator issued his award before the Sixth Circuit decided the appeal. The union argued that the appeal of the preliminary injunction was moot. The Sixth Circuit found to the contrary, despite the fact that the union had never actually posted the required bond:

> The issuance of an injunction in a case involving or growing out of a labor dispute must be conditioned on an undertaking by the person seeking the injunction to make the person enjoined whole for any loss, expense or damage caused by the improvident or erroneous issuance of the injunction. This requirement is made jurisdictional by § 1 of the Norris-LaGuardia Act, 29

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[2] A so-called *Boys Market* injunction is a recognized exception to the Act's prohibition against injunctions. In *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970), the Court authorized an injunction against a strike where an employer had agreed to final and binding arbitration as the quid pro quo for an agreement not to strike. It found that, in the absence of the availability of injunctive relief in such situations, the important federal policy favoring arbitration would be undermined.

> U.S.C. § 101, supra. Having sought and obtained a preliminary injunction the union is obligated to pay the costs and damages incurred or suffered by the party found to have been wrongfully enjoined. 696 F.2d 452, 459.

The Sixth Circuit relied on a factually similar case, *Lever Bros. Co. v. Intern. Chemical Workers Union, Etc.*, 554 F.2d 115 (6th Cir. 1976):

> Rule 65(c) of the Federal Rules of Civil Procedure does not stand as authority that injunction bonds in labor cases are to be conditioned on the outcome of the merits of arbitration. Rather, it is settled that the recoverable damages under such a bond are those that arise from the operation of the injunction itself and not from damages occasioned by the suit independently of the injunction. 554 F.2d 115 at 120.

In the present case, the district court premised its injunction on its conclusion that the Act did not apply to municipal employers, and that plaintiff's impending termination was not a labor dispute. The Ninth Circuit disagreed, expressly holding that *United States v. United Mine Workers*, 330 U.S. 258 (1947), does not exclude municipal employers from the Act's coverage ("*Mine Workers* is inapposite." App. Pet. A-8), and that plaintiff's impending termination was indeed a labor dispute ("Under Norris-LaGuardia's "broad" definition, this is a labor dispute." App. Pet. A-7). Because the Ninth Circuit decided that this labor dispute fell within the exception to the Act, it in effect found that Respondent should have been required to post a bond. However, just as in *Inter. U., United Auto., Etc. v. LaSalle Mach. Tool, supra*, such a

failure does not make the wrongful issuance of the injunction moot.

2. Petitioner never abandoned this appeal.

The instant litigation has spawned two separate appeals, each involving separate and distinct issues.

The instant appeal, based on the Act, seeks review of the Ninth Circuit's decision creating a new exception to the Act for actions under 42 U.S.C. § 1983. Petitioner immediately appealed from the issuance of the preliminary injunction. Sin:ultaneously, litigation of issues underlying Respondent's § 1983 claim proceeded through the district court.

The § 1983 issues are now before the Ninth Circuit, as a second appeal, challenging the district court's permanent injunction prohibiting petitioner from applying to Respondent a work rule which the court found unconstitutional. Respondent's brief is due to be filed at the Ninth Circuit on April 25, 1994.

Petitioner could not include the Norris-LaGuardia issue in the docketing statement, or brief, for the second appeal, because the Ninth Circuit had already decided the issue. *Reuter v. Skipper*, 4 F.3d 716 (9th Cir. 1993).

Far from abandoning the Norris-LaGuardia issue, Petitioner has vigorously pursued its resolution through timely appeal to the Ninth Circuit, petition for rehearing and suggestion for rehearing en banc (Pet. App. at B-1),

as well as the instant petition for writ of certiorari, at the same time it is litigating the underlying § 1983 action.[3]

3. This case is not moot.

Respondent is mistaken in asserting this case is moot. *Weinstein v. Bradford*, 423 U.S. 147 (1975), provides that where a challenged action is too brief in duration to be fully litigated prior to its cessation, and it is capable of repetition, the case is not moot.

In *Weinstein*, the Court found the case was moot because the prisoner challenging procedures for determining eligibility for parole had been released from supervision. The Court found that, although the petitioners would continue to administer the North Carolina parole system, there was no demonstrated probability that the respondent would ever be before the parole board again.

Here, as in *Weinstein*, Petitioner will continue to administer the Sheriff's Office. However, unlike *Weinstein*, Respondent and all other Corrections Officers remain subject to a work rule restricting their non-business contacts with former inmates. Indeed, the work rule in its various forms is the primary cause of litigation

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[3] Respondent contends Petitioner abandoned the appeal of the preliminary injunction because there was not a direct appeal following the district court's October 12, 1993, declaratory judgment and permanent injunction. This is procedural hairsplitting. Petitioner timely appealed the district court's August 24, 1993, order granting summary judgment, on September 23, 1993. If the Ninth Circuit reverses that order, the permanent injunction will necessarily be vacated.

between Respondent and the Multnomah County Corrections Officers Association, on behalf of its members. When Reuter – or another Corrections Officer – again runs afoul of the workrule, this case will be repeated. When a preliminary injunction again issues, prohibiting Petitioner from administering discipline, it will again be of such short duration that the issue, of whether or not the Act prohibits an injunction in this type of labor dispute, will again evade review.

Indeed, for this exception to mootness to apply, Respondent need not be the only party affected by the probability of repetitive litigation evading review. In *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976), an order restraining publicity before a trial expired before the case challenging the constitutionality of the order was heard on appeal. Because the case involved important freedom of press issues, and state prosecutors in the future might seek similar pre-trial orders, the State of Nebraska intervened. The Court found that the dispute was capable of repetition, and not moot, despite the fact that only one particular judge, and not the State, was the named defendant.

Even though the union is not named in the present action, the reasonable expectation exists that the dispute, over whether Norris-LaGuardia prohibits preliminary injunctions against discipline of union members, will arise again between the union – or its members – and Petitioner. At the hearing on the preliminary injunction in this case, officers of Respondent's union testified that the work rule for which Respondent was being disciplined has been, and obviously continues to be, the subject of repeated litigation. Moreover, now that the district court

has once enjoined discipline based on violation of the work rule, it is all the more likely to be asked to do so again. Therefore, as in *Nebraska Press*, supra, this case is not moot.

Finally, in *International U., Auto., Etc. v. LaSalle Mach. Tool*, supra, in addition to finding that the appeal was alive because the issue of damages was still alive, the court found that the appeal was not moot because "the issue of the validity of the preliminary injunction would evade review." *Id.*, at 459. "When these circumstances exist the litigation is not moot." *Id.*[4]

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[4] Respondent relies on *Cert. Grocers of Ill. v. Produce Etc., Un. Loc. 703*, 816 F.2d 329 (7th Cir. 1987) for the proposition that a preliminary injunction always merges into a permanent injunction (Respondent's Brief p. 8-9). This holding is in direct conflict with *Inter. U., United Auto., Etc. v. LaSalle Mach. Tool*, supra, and vitiates Respondent's argument that the instant case should not be accepted for review because there is no conflict between the circuits (Respondent's Brief p.11).

CONCLUSION

The Ninth Circuit's Opinion should be reviewed and reversed by this Court.

Dated: March 24, 1994.

Respectfully submitted,

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